Filed 9/29/17 P. v. Weekly CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. FREDERICK JUSTINE WEEKLY, Defendant and Appellant.	D071294 (Super. Ct. No. SCD253909)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed with direction to amend the abstract of judgment.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Frederick Justine Weekly guilty of first degree murder (Pen. Code, § 187, subd. (a))[1] and that Weekly personally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)). The trial court sentenced Weekly to a prison term of 50 years to life, consisting of a 25-year-to-life term for the murder and a 25-year-to-life term for the firearm enhancement.

Weekly contends (1) the trial court prejudicially erred in erroneously instructing the jury that it could consider evidence of Weekly's voluntary intoxication only in deciding whether Weekly acted with intent, but not in considering whether Weekly premeditated and deliberated the murder; (2) the sentence enhancement for the firearm allegation is unauthorized because the information did not plead personal use of a firearm; and (3) the abstract of judgment should be amended to conform to the trial court's order that victim restitution was to be a joint and several obligation with Weekly's codefendant, who pled guilty prior to trial.

We conclude: (1) although the content of the voluntary intoxication instruction was erroneous, Weekly has not established that it is reasonably probable he would have obtained a more favorable result without the error; (2) Weekly's challenge to the imposition of the sentencing enhancement lacks merit; and (3) the abstract of judgment must be amended to reflect the joint and several restitution order made at sentencing. Accordingly, we direct the trial court to amend the abstract of judgment, and in all other respects we affirm the judgment.

---

1 Unless otherwise indicated, all further statutory references are to the Penal Code.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Weekly admitted at trial to shooting and killing Kirk Sampson on the night of September 2 or the early morning of September 3, 2015. The question for the jury was whether, as Weekly claimed, the shooting was an accident that occurred while the two men struggled over a gun, or whether, as the prosecution contended, Weekly either intentionally shot Sampson or shot him as part of an intentional carjacking.

Weekly and Sampson were friends who knew each other because they had the same ex-girlfriend, Angela Anderson.[2] Weekly and Anderson broke up in early August 2015, approximately a month before the shooting. Anderson dated Sampson before she was with Weekly, and she remained good friends with Sampson. Anderson, Weekly and Sampson had all spent time together.

In March 2015, Anderson obtained inheritance money and used some of it to buy a 1997 Toyota 4Runner (the Truck). The evidence was conflicting as to whether Anderson was letting Sampson drive the Truck or whether she had gifted it to him. The Truck was registered in Sampson's name, and Sampson drove the Truck for approximately two months until Anderson and Weekly told Sampson to hand over the Truck to them. According to Weekly, Anderson retook possession of the Truck because Sampson had not been upholding his part of an agreement that Sampson and Anderson had entered into

---

[2] As the parties note, Angela Anderson is sometimes referred to in the record as Angela Gerber. For the sake of clarity, we refer to her as Anderson.

concerning the Truck's upkeep and registration. A friend testified that Sampson was upset that the Truck had been taken from him.

In August 2015, after Weekly and Anderson broke up, Sampson was living for a short time in a trailer with Anderson and sometimes drove the Truck with Anderson's permission. On August 30, 2015, Sampson left Anderson's trailer with the Truck and did not return. According to witnesses, Anderson was angry that Sampson left with the Truck, and she made calls to friends, including to Weekly, to see if anyone could find Sampson or the Truck.

On September 3, 2015, three days after Sampson left with the Truck, Sampson was found dead on the side of the road in a quiet residential area at 3:00 a.m. Sampson was killed by a single bullet to the chest that entered through his right ribcage and passed through his right lung and his heart. Sampson also had injuries to his face caused by blunt force, consistent with either a fight or a car accident. Medical evidence suggested that the time of death was between 8:30 p.m. on September 2 and 2:30 a.m. on September 3. It appeared that Sampson's body had been left by the side of the road but that the shooting occurred elsewhere. A toxicology test performed during the autopsy showed a high level of methamphetamine in Sampson's body, and a vial of a substance suspicious for methamphetamine was found in Sampson's pocket.

Police eventually identified Weekly as a suspect, arrested him, and charged him with murdering Sampson (§ 187), in addition to alleging discharge of a firearm, proximately causing death. (§ 12022.53, subds. (d), (e)(1).) Anderson was also arrested

and charged with murder in the same information.[3]

In an interview with police on September 17, 2015, Weekly claimed to know nothing about Sampson's death, but said that he met up with Sampson on September 2, 2015, after coincidentally noticing the Truck parked at the curb while taking a walk. Weekly told police that he and Sampson got into a fist fight inside the Truck after Weekly found out that Sampson had taken the Truck from Anderson and criticized him for doing so. Weekly claimed that after he and Sampson exited the Truck to continue the fight, the Truck rolled away and crashed into a pole. Weekly got into the Truck and drove it to Anderson.

At trial, Weekly described a similar situation but admitted that he had shot Sampson. Weekly testified that he noticed the Truck in the neighborhood where he was visiting a friend on the evening of September 2, and not knowing whether it was Anderson or Sampson who parked the Truck there, he sat in the Truck and waited for one of them to appear so that he could ask for a ride to a neighborhood where he planned to buy drugs. Sampson eventually appeared at the Truck and agreed to give Weekly a ride later in the evening. The men met up later that night and spent some time together in a

---

[3] Anderson pled guilty to voluntary manslaughter (§ 192, subd. (a)) on August 22, 2016. Thereafter, the information was amended to make allegations solely against Weekly. Both the original information and the amended information alleged that "the defendant, [Weekly], was a principal in the foregoing offense, and in the commission of the offense at least one principal personally and intentionally discharged a firearm, to wit: handgun, and proximately caused great bodily injury and death to a person (other than an accomplice), within the meaning of . . . [s]ection 12022.53[, subdivisions](d) and (e)(1)." (Capitalization omitted.)

nearby park where they drank alcohol and smoked methamphetamine, laughing and joking with each other. Together, the two men drove downtown to meet Sampson's friend, who sold them methamphetamine. They then returned to the same area by the park and smoked some more methamphetamine.

According to Weekly's testimony, while the two men were having a good time hanging out together, Anderson called Weekly. When Anderson found out Weekly was with Sampson, she told him that Sampson had taken the Truck and asked Weekly to bring the Truck back to her. Weekly said he would not get involved, and Anderson hung up on him. Anderson then contacted Sampson, either by phone call or by text. According to Weekly, after the contact from Anderson, Sampson's demeanor changed and he was no longer friendly toward Weekly. Sampson refused Weekly's request for a ride to a more distant neighborhood, but he agreed to drive Weekly a short distance to a friend's house. Weekly testified that when they arrived at his friend's house, he again asked for a ride to the more distant neighborhood, but Sampson again refused. Sampson also asked whether Weekly remembered the last time he and Anderson took the Truck from him and stated, "I bet that won't happen again."

Sampson threw a punch at Weekly, and the two men started to fight inside the Truck. Weekly then saw Sampson pull out a sawed-off rifle. Weekly grabbed the rifle and tried to keep it pointed away from him, while Sampson also kept a grip on the rifle. After Weekly hit Sampson's chin with a lighter that was in his hand, Sampson dropped his grip on the rifle, put the Truck in gear and accelerated. The passenger door was open next to Weekly, and the sudden acceleration caused him to fall out of the truck, and also

accidentally caused him to fire the rifle into Sampson's chest. The Truck moved forward with Sampson in it and crashed into a telephone pole.

According to Weekly, he panicked after shooting Sampson, got into the Truck, shoved Sampson aside, and drove the Truck to a residential neighborhood where he dropped Sampson's body. He discarded the rifle in a wooded area, stopped by a fast food restaurant, and then took the Truck to Anderson. Together, Anderson and Weekly drove the Truck to a friend's property in a rural area. In early October 2015, the police located the Truck abandoned in a parking lot, where it had been parked since September 17.

Cell phone records introduced at trial showed that Weekly and Sampson had contact through their phones on the night of September 2, and their cell phones were in the same general area at certain points during the evening, consistent with Weekly's description of their movements. The evidence at trial also established that Weekly's DNA was found on Sampson's wrist, ankles, knuckles and fingernails.

Weekly was prosecuted under two alternative theories of first degree murder, namely (1) that Weekly killed Sampson during an intentional carjacking, and thus committed felony murder; or (2) Weekly committed an intentional murder with premeditation and deliberation.[4]

The jury found Weekly guilty of first degree murder, and it also made a true finding that Weekly proximately caused death to a person by personally and intentionally

---

4 Although felony murder during a carjacking was one of the theories of murder, the information did not charge Weekly with the separate crime of carjacking, and accordingly the jury was not asked to return a verdict on carjacking.

discharging a firearm (§ 12022.53, subd. (d)).[5] The trial court sentenced Weekly to an indeterminate prison term of 50 years to life, composed of a 25-year-to-life term for the murder conviction and a 25-year-to-life term for the firearm enhancement.

II.

DISCUSSION

A. *Weekly's Challenge to the Voluntary Intoxication Jury Instruction*

1. *The Instruction Was Erroneous*

The jury was instructed regarding voluntary intoxication pursuant to CALCRIM No. 625 as follows: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill for murder or the intent to steal for the carjacking theory of felony murder. [¶] A person is *voluntarily intoxicated* if he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect or willingly assuming the risk of that

---

5 Based on the jury's finding on the firearm enhancement that Weekly intentionally discharged a firearm, it is unlikely the jury convicted Weekly on the theory that he *accidentally* discharged the gun during an intentional carjacking. Accordingly, the jury either found that Weekly was guilty of first degree murder (1) based on a felony murder during which he intentionally discharged the gun, or (2) based on a theory that Weekly killed Sampson willfully, deliberately and with premeditation.

effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."[6]

Weekly contends that this instruction was legally erroneous, and we agree.[7] Although the jury was instructed that it could not consider voluntary intoxication "for any other purpose" except intent, this statement is incorrect in light of section 29.4, subdivision (b), which provides that "[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, *when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought*." (Italics added.) Because Weekly was charged with murder, in addition to stating the jury could consider voluntary intoxication when deciding whether Weekly had an intent to kill (i.e., express malice aforethought),

---

6 Although the record is not completely clear, it appears from a stamped notation by the trial court on the printout of the jury instruction under CALCRIM No. 625 that the defense requested that instruction.

7 Although defense counsel did not object to the error in the instruction on voluntary intoxication, the People do not contend that Weekly has forfeited his ability to seek reversal based on the erroneous instruction. We find no basis to conclude that the argument has been forfeited. "Where . . . defendant asserts that an instruction is incorrect in law an objection is not required." (*People v. Capistrano* (2014) 59 Cal.4th 830, 875, fn. 11.) Further, a defendant does not forfeit the right to obtain a reversal based on an instructional error when the defendant establishes that his substantial rights have been affected by the error, and that analysis also requires us to consider the merits of the argument. (§ 1259; *People v. Battle* (2011) 198 Cal.App.4th 50, 64; *People v. Franco* (2009) 180 Cal.App.4th 713, 719.) In an alternative argument, Weekly states that if we conclude that an objection to the instruction was required to preserve the issue for appeal, we should nevertheless reach the instructional error issue because defense counsel was ineffective for failing to object. Because we conclude that the argument was not forfeited, we need not and do not consider Weekly's alternative argument that he received ineffective assistance of counsel.

the instruction *also* should have stated that the jury could consider voluntary intoxication in deciding whether Weekly *premeditated and deliberated* in killing Sampson.[8] "Although a trial court has no sua sponte duty to give a 'pinpoint' instruction on the relevance of evidence of voluntary intoxication, 'when it does choose to instruct, it must do so correctly.' " (*People v. Pearson* (2012) 53 Cal.4th 306, 325 (*Pearson*).) Here, the trial court erred because it provided an *incorrect* instruction on voluntary intoxication, which precluded the jury from considering evidence of voluntary intoxication in deciding whether Weekly premeditated and deliberated Sampson's murder.

The People contend that the instruction was not erroneous when the jury instructions are considered as a whole. According to the People, "viewing the instructions as a whole, a reasonable juror would understand that he or she could consider evidence of voluntary intoxication in determining whether [Weekly] acted with deliberation or premeditation as well as whether [Weekly] intended to kill." We disagree. While it is true that we may "review the instructions as a whole to determine whether it is 'reasonably likely the jury misconstrued the instructions as precluding it from considering' the intoxication evidence" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 (*Mendoza*)), in this case nothing in the instructions suggested to the jury that it could

---

8 Indeed, the form instruction for CALCRIM No. 625 provides bracketed language for use in murder prosecutions, stating that the jury can consider evidence of voluntary intoxication "in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] . . . ." (CALCRIM No. 625.) However, perhaps because of clerical error, that bracketed language was not included in the version of CALCRIM No. 625 presented and read to the jury in this case.

consider voluntary intoxication when deciding whether Weekly premeditated and deliberated. Indeed, quite to the contrary the plain language of the instruction expressly *precludes* any such approach, as it states that voluntary intoxication may be considered in deciding whether Weekly acted with intent, and then tells the jury that "*you may not consider evidence of voluntary intoxication for any other purpose*." (Italics added.) A reasonable juror following this instruction would understand that voluntary intoxication *could not* be used to decide whether Weekly premeditated and deliberated Sampson's murder.[9]

---

9 The People rely on *People v. Castillo* (1997) 16 Cal.4th 1009, in which an instruction on voluntary intoxication was held not to be erroneous, even though it did not mention premeditation as one of the mental states for which voluntary intoxication could be considered. However, *Castillo* is inapposite because it dealt with different wording in the jury instructions. In *Castillo*, the trial court "told the jury it should consider defendant's voluntary intoxication in determining whether he had the specific intent or mental state required for the charged crime." (*Id*. at p. 1014.) The defendant contended that "defense counsel was ineffective for not requesting that the instruction specifically tell the jury it should consider the intoxication evidence in deciding whether he *premeditated* the killing. In effect, defendant argue[d] that the pinpoint instruction did not pinpoint enough, that it did not additionally say that premeditation is a mental state." (*Ibid*.) *Castillo* concluded that "the trial court correctly and fully instructed the jury on the way in which the evidence of intoxication related to defendant's mental state, including premeditation." (*Id*. at pp. 1015-1016.) Because the instruction on voluntary intoxication referred only to the specifically required "mental state," and elsewhere in the instructions, the jury was informed that premeditation and deliberation were necessary mental states, "[a] reasonable jury would have understood deliberation and premeditation to be 'mental states' for which it should consider the evidence of intoxication as to either attempted murder or murder." (*Id*. at p. 1016.) Here in contrast, the instruction did not refer generally to a "mental state" and it specifically *precluded* the jury from using voluntary intoxication for *any issue except intent*. Thus, here, unlike in *Castillo*, even in light of the instructions as a whole, the voluntary intoxication instruction contained an incorrect statement of the law.

2. *Weekly Has Not Established That the Error Was Prejudicial*

Having concluded that it was error for the trial court to instruct the jury with a version of CALCRIM No. 625 that failed to inform the jury that it could consider voluntary intoxication when deciding whether Weekly acted with premeditation and deliberation, we next consider whether the error was prejudicial.[10]

a. *The* Watson *Standard for Assessing the Prejudice Attributable to Errors of State Law Applies Here*

The first issue we must address in our harmless error review is what standard applies to our analysis. Weekly contends that the standard for assessing the prejudice resulting from federal constitutional error should apply. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) The People contend that the instructional error is reviewed under the standard of prejudice for errors of state law. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

As we have explained, the error at issue here had the effect of precluding the jury from considering evidence of voluntary intoxication when deciding whether the People met their burden to prove that Weekly acted with premeditation and deliberation. As our Supreme Court has held, when, as here, an instructional error has the effect of precluding the jury from considering the evidence of voluntary intoxication in deciding whether the

---

10 Of course, as premeditation and deliberation are not required for a second degree murder verdict (§ 189), if the jury concluded that the People failed to prove that Weekly premeditated and deliberated when he killed Sampson, the jury could have convicted Weekly of second degree murder, which would have been a more favorable result for Weekly than a first degree murder conviction.

People met their burden to establish a necessary mental state, "[a]ny error would have the effect of excluding defense evidence and is thus subject to the usual standard for state law error: 'the court must reverse only if it also finds a *reasonable probability* the error affected the verdict adversely to defendant.' " (*Mendoza*, *supra*, 18 Cal.4th at pp. 1134-1135, italics added [holding that if, on remand, the trial court determined that the jury instructions were defective because they precluded the jury from considering evidence of voluntary intoxication on the issue of whether the defendant acted with the specific intent needed for aiding and abetting liability, the trial court should apply the *Watson* standard in determining the prejudicial nature of the instructional error].) Our Supreme Court has reaffirmed in two subsequent opinions what it held in *Mendoza*, namely that when an instructional error precludes the jury from considering evidence of voluntary intoxication on the issue of whether the defendant acted with the required mental state for aiding and abetting liability, the *Watson* standard for assessing prejudice applies. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 897; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 187.) *Mendoza* and the cases following it are applicable here. As in those cases, by precluding the jury from considering voluntary intoxication on the issue of whether Weekly acted with premeditation and deliberation, the erroneous instruction on voluntary intoxication had "the effect of excluding defense evidence and is thus subject to the usual standard for state law error." (*Mendoza*, at p. 1134; see also *Pearson*, *supra*, 53 Cal.4th at p. 325 [the prejudice from an error in omitting torture from the list of specific intent crimes for which the jury could consider evidence of voluntary intoxication was assessed by application of "the 'reasonable probability' test of prejudice"].)

Weekly contends that the *Chapman* standard should apply here, despite our Supreme Court's holding in *Mendoza*. Weekly attempts to distinguish *Mendoza* by arguing that the instructional error in this case was *preclusive* because it completely precluded the jury from considering evidence of voluntary intoxication on the issue of premeditation and deliberation, but in *Mendoza* the instruction was merely *incomplete* because it failed to inform the jury that evidence of voluntary intoxication could be considered in determining the particular mental state at issue. According to Weekly, in *Mendoza* the instructions at issue "did not by their terms preclude the jury from considering the voluntary intoxication evidence as to the requisite elements for aiding and abetting," and instead simply failed to "specify whether or not the jury could consider the voluntary intoxication evidence as to aiding and abetting." Weekly's attempt to distinguish *Mendoza* is unpersuasive. As we have noted, in *Mendoza* our Supreme Court did not reach the issue of whether the instructions, as a whole, erroneously communicated to the jury that it was precluded from considering voluntary intoxication as to the state of mind required for aiding and abetting. (*Mendoza, supra,* 18 Cal.4th at p. 1135.) Instead, *Mendoza* remanded that issue to the trial court. (*Ibid*.) However, *Mendoza* was clear that *if*, on remand, the trial court found the instructions to be erroneous in that they precluded the jury from considering the voluntary intoxication evidence, that error would be subject to harmless error review under *Watson* because it has "the effect of *excluding* defense evidence" on the required mental state. (*Mendoza*, at p. 1134, italics added.) In choosing to refer to an instructional error with the effect of "excluding" evidence, it is clear that *Mendoza* was describing an instructional error *precluding* the jury from considering the

evidence for the purpose of determining the required mental state, not merely an instructional error that *failed to specify* whether the jury could consider the evidence for that purpose.

Weekly also contends that we should evaluate whether the error was prejudicial under the standard for federal constitutional error set forth in *Chapman*, *supra*, 386 U.S. at page 24, because his federal constitutional right to present a defense was infringed when the trial court gave the jury the erroneous voluntary intoxication instruction. The argument lacks merit. As our Supreme Court has explained, voluntary intoxication is not a defense. (*People v. Boyer* (2006) 38 Cal.4th 412, 469; *People v. Saille* (1991) 54 Cal.3d 1103, 1118-1119.) Instead, when appropriate, evidence of voluntary intoxication may be "proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt." (*Saille*, at p. 1120.) Accordingly, there is no merit to Weekly's argument that by giving an instruction that precluded the jury from considering evidence of voluntary intoxication on the issue of premeditation and deliberation, the trial court violated Weekly's federal constitutional rights by preventing him from presenting a defense. (See *Pearson*, *supra*, 53 Cal.4th at p. 325, fn. 9 ["The failure to give a fully inclusive pinpoint instruction on voluntary intoxication did not, contrary to defendant's contention, deprive him of his federal fair trial right . . . ."].)

Nor is there merit to Weekly's contention that the erroneous voluntary intoxication instruction constituted a misinstruction on the elements of an offense amounting to federal constitutional error. (See *People v. Flood* (1998) 18 Cal.4th 470, 502-503 ["an

instructional error that improperly describes or omits an element of an offense" is subject to harmless error review under *Chapman*].) This argument fails because our Supreme Court has made clear that an instructional error that precludes the jury from considering voluntary intoxication when determining whether a defendant possessed a specific mental state does not misdescribe or omit an element of the offense, but instead simply has "the effect of excluding defense evidence." (*Mendoza*, *supra*, 18 Cal.4th at p. 1134; see also *Pearson*, *supra*, 53 Cal.4th at p. 325, fn. 9 [erroneous pinpoint instruction on voluntary intoxication did not "unconstitutionally lessen the prosecution's burden of proof" on an element of the crime].)

We note that in a recent opinion that is now under review by our Supreme Court, our colleagues in the Sixth District reaffirmed the applicability of the *Watson* standard for assessing prejudice when an instructional error results in the jury being precluded from considering voluntary intoxication on the issue of the defendant's mental state. (*People v. Soto* (2016) 248 Cal.App.4th 884, 901-903, review granted Oct. 12, 2016, S236164 (*Soto*).) Specifically, *Soto* held that the jury instructions erroneously precluded the jury from considering voluntary intoxication in determining whether defendant acted in imperfect self-defense, but the error was harmless under the *Watson* standard. (*Soto*, at p. 898.) In determining that the *Watson* standard applied in assessing the prejudicial nature of the instructional error, *Soto* cited and followed *Mendoza* for the proposition that "instructional error restricting a jury's consideration of voluntary intoxication amounts to state law error only." (*Soto*, at p. 901, citing *Mendoza*, at pp. 1134-1135.) However, in the course of its analysis, *Soto* also addressed and rejected an argument advanced by the

defendant for the application of the *Chapman* standard, which the defendant based on United States Supreme Court precedent.

> "Defendant's position that the *Chapman* standard applies finds some support in the opinions of several United States Supreme Court justices in *Montana v. Egelhoff* (1996) 518 U.S. 37 (*Egelhoff*). There, the court considered the effect of a Montana law restricting juries from considering voluntary intoxication in determining the state of mind required for any criminal offense. Based on historical common law principles, a four-justice plurality held the law did not violate federal due process standards. (*Id.* at p. 51 (plur. opn. of Scalia, J.).) Justice Ginsburg concurred on the ground that a state is not constitutionally prohibited from defining mens rea so as to eliminate the exculpatory nature of voluntary intoxication. (*Id.* at pp. 58-59 (conc. opn. of Ginsburg, J.).) But Justice Ginsburg distinguished the Montana statute from evidentiary rules that are unconstitutional because they prevent the defendant from introducing relevant, exculpatory evidence that could negate an essential element of the offense. Four justices dissented and would have held the Montana law violated due process by preventing the jury from considering evidence relevant to the defendant's mens rea. (*Id.* at p. 63 (dis. opn. of O'Connor, J.).)
>
> "The instruction at issue here arguably prevented the jury from considering evidence which California law makes relevant to an element of the offense, such that Justice Ginsburg and the four dissenting justices in *Egelhoff* might have held it unconstitutional. However, absent a clearer statement of the law from the United States Supreme Court, we are bound by the precedent set forth by this state's high court in *Mendoza*. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450.)" (*Soto, supra*, 248 Cal.App.4th at pp. 901-902, review granted.)

Our Supreme Court has granted review of *Soto*, specifying the issues presented as "(1) whether the trial court erred in instructing the jury . . . and (2) if so whether the error was prejudicial." (*People v. Soto* (2016) 381 P.3d 232.) Based on our review of the parties' briefing in the Supreme Court, one of the issues in contention and subsumed under the prejudice analysis is whether our Supreme Court should revisit its decision in *Mendoza* that the *Watson* standard applies in assessing the prejudicial nature of an

instructional error that precludes the jury from considering the defendant's voluntary intoxication when determining whether the defendant acted with a specific mental state. However, unless and until our Supreme Court decides to revisit and reassess its holding in *Mendoza*, we are bound to follow it. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County, supra,* 57 Cal.2d 450.) Accordingly, we apply the *Watson* standard in determining whether the instructional error at issue here was prejudicial.

b. *Under* Watson*, a More Favorable Result for Weekly Was Not Reasonably Probable in the Absence of the Error*

Under the *Watson* standard, to establish prejudice Weekly must show that " 'it is reasonably probable that a result *more favorable* to the appealing party would have been reached in the absence of the error.' " (*People v. Mower* (2002) 28 Cal.4th 457, 484, italics added.) "There is a reasonable probability of a more favorable result . . . when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.' " (*Ibid*.) Under this standard, "review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

Here, as we will explain, Weekly has not established a reasonable probability that he would have obtained a more favorable result had the jury been instructed that it could consider voluntary intoxication in deciding whether Weekly premeditated and deliberated Sampson's murder because the evidence presented at trial did not establish that Weekly's voluntary intoxication made it more likely that he would act rashly and impulsively rather than with premeditation and deliberation.[11]

As an initial matter, we acknowledge that although the evidence was not conclusive regarding whether Weekly was voluntarily intoxicated during the shooting, the jury could reasonably have reached that conclusion based solely on Weekly's own testimony. Specifically, Weekly testified that he and Sampson used methamphetamine and alcohol prior to the shooting. In corroboration, the toxicology report on Sampson

---

11 It is possible that the jury did not even consider the erroneous jury instruction on the issue of whether Weekly acted with premeditation and deliberation, as the jury may have based its first degree murder verdict solely on a felony-murder theory, which does not require such a finding. However, our harmless error analysis does not consider the fact that the jury may not have relied on the erroneous jury instruction on premedication and deliberation when arriving at its first degree murder verdict, and that it instead may have convicted on a felony-murder theory. Our Supreme Court has indicated that when it is not possible to determine whether the jury relied on a legally correct theory of guilt or a theory that is tainted by instructional error, the possibility that the jury *may have* relied on the legally correct theory is not sufficient to prevent reversal. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1122 [in the case of instructional error, among other legal errors, " '[w]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand,' " based on the presence of the legally correct theory].) Our harmless error analysis therefore proceeds on the assumption that the jury did consider the issue of premeditation and deliberation.

indicated a high level of methamphetamine. Indeed, defense counsel mentioned several times during closing argument that Weekly was intoxicated during the killing.[12]

However, apart from the bare fact that Weekly claims he used some unspecified amount of alcohol and methamphetamine, the record contains no evidence whatsoever regarding the *effect* that intoxication by methamphetamine and alcohol could have had on Weekly's mental state to make him less likely to have premeditated and deliberated before he killed Sampson. During Weekly's own testimony he was not asked, and did not comment upon, how his mental state was affected by his consumption of methamphetamine and alcohol on the night of the killing. Similarly, there was no evidence through the testimony of Weekly or any other witness about how drugs and alcohol affected Weekly's mental state on other occasions to make him more impulsive. For instance, no one testified that Weekly had used methamphetamine or alcohol in the past and had become irrationally violent or impulsive as a result. In addition, no expert testimony was offered at trial regarding the effect that alcohol and methamphetamine can have on a person's mental state, including whether the intoxicated person would act rashly and impulsively rather than with premeditation and deliberation.

---

12 Defense counsel raised the issue of intoxication in connection with three issues during closing argument: (1) to argue that although Weekly may not have acted after the shooting like someone who had just accidentally shot someone, as he did not seek medical help or report the accident, his irrational reaction can be understood as someone who is very high on methamphetamine and "freaking out," rather than as an indication of guilt; (2) to argue that Weekly was too high on methamphetamine to form an intent to commit a carjacking; and (3) to argue, briefly, that Weekly was too high on methamphetamine to commit "premeditated deliberated murder."

An analogous situation is discussed in cases considering whether a voluntary intoxication instruction should have been given when there was evidence that the defendant had used intoxicating substances, but there was no evidence about how the defendant's mental state was affected. In those cases, an instruction on voluntary intoxication was not warranted because the record contained insufficient evidence concerning the *effect* of the intoxication. (See *People v. Marshall* (1996) 13 Cal.4th 799, 848 [the evidence did not require giving a voluntary intoxication instruction because "[a]lthough the offenses were committed after defendant . . . had drunk an unspecified number of alcoholic drinks over a period of some hours, evidence of the *effect* of defendant's alcohol consumption on his state of mind is lacking"]; *People v. Williams* (1997) 16 Cal.4th 635, 677-678 [trial court properly refused defendant's requested instruction on voluntary intoxication despite evidence defendant was " 'doped up' and 'smokin' pretty tough" around the time of the killings because "there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent"]; see also *People v. Frierson* (1979) 25 Cal.3d 142, 156-157 [instruction on diminished capacity based on intoxication was not required because "in the absence of evidence regarding the amount of drugs ingested by defendant and their effect upon his mental state, no reasonable juror would have concluded that defendant lacked a specific intent to commit robbery"]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1180-1181 [voluntary intoxication instruction was not required where "[n]either defendant nor any of the other [relevant] . . . witnesses . . . testified that defendant's beer drinking had had any noticeable effect on his mental state or actions," and defendant "did not suggest that his

drinking had affected his memory or conduct"].) The value of these cases is that they demonstrate that the probative value of voluntary intoxication evidence is greatly increased if there is evidence of *how the defendant's mental state was impacted* by the intoxicating substance, and conversely the probative value is decreased if the jury learns nothing more than the bare fact that the defendant used an intoxicating substance around the time of the crime.

Here, in light of the absence of any evidence that Weekly's use of methamphetamine and alcohol prior to the shooting impacted his mental state by making him either (1) *more* likely to act rashly and impulsively, or (2) *less* likely to premeditate and deliberate, it is significantly less likely that the jury would have come to a different conclusion on the issue of premeditation and deliberation had they been instructed that they could consider evidence of voluntary intoxication on that issue. We accordingly conclude that it is not reasonably probable that the jury would have convicted Weekly of second degree murder rather than first degree murder had it been instructed that it could consider voluntary intoxication when deciding whether Weekly killed with premeditation and deliberation.

B. *Weekly's Challenge to the Firearm Enhancement*

We next consider Weekly's challenge to the imposition of the 25-year-to-life sentence enhancement based on the jury's finding that he personally and intentionally discharged a firearm, proximately causing death.

In both the original information and the amended information, it was alleged that "the defendant, [Weekly], was a principal in the foregoing offense, and in the

commission of the offense at least one principal personally and intentionally discharged a firearm, to wit: handgun, and proximately caused great bodily injury and death to a person (other than an accomplice), within the meaning of . . . [s]ection 12022.53[, subdivisons](d) and (e)(1)." (Capitalization omitted.) Based on this allegation, the verdict form asked the jury to decide whether Weekly "personally and intentionally discharge[d] a firearm . . . and proximately caused death to a person within the meaning of . . . section 12022.53[, subdivisions](d) and (e)(1)." Although the verdict form identified both subdivisions (d) and (e)(1), the trial court explicitly imposed a sentence enhancement of 25 years to life based solely on the true finding under section 12022.53, subdivision (d).

Subdivision (d) of section 12022.53 provides for a sentence enhancement of 25 years to life for "any person who, in the commission of a felony specified in subdivision (a) [which includes murder] . . . , personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice."

Subdivision (e) of section 12022.53, which is also identified in the information and the verdict form, provides that the enhancements in section 12022.53 apply to any principal in an offense, not just to the person who actually uses or discharges the firearm, if it has been pled and proved that the person committed a felony for the benefit of a criminal street gang and that another principal has used or discharged a firearm as

specified in subdivisions (b), (c), or (d) of section 12022.53.[13] The information contained no allegation that Weekly committed a crime for the benefit of a criminal street gang, there was no such evidence presented at trial, and the jury was not instructed that it should make such a finding. Thus, although the information identified subdivision (e) of section 12022.53, the People clearly did not proceed at trial under that provision.

Instead, the jury was simply instructed with language applicable to a sentencing enhancement under subdivision (d) of section 12022.53. Specifically the jury was instructed that to prove the firearm allegation the People must prove: "1. The defendant personally discharged a firearm during the commission of [murder]; [¶] 2. The defendant intended to discharge the firearm; [¶] AND [¶] 3. The defendant's act caused the death of a person."

Weekly contends that the imposition of the sentence enhancement under subdivision (d) of section 12022.53 was unauthorized because the language used in the information did not track the language of subdivision (d) and thus did not properly allege an enhancement under that subdivision. As Weekly points out, instead of alleging that Weekly "personally and intentionally discharge[d] a firearm" as set forth in language of the statute (§ 12022.53, subd. (d)), the information alleged that "at least one principal personally and intentionally discharged a firearm," which could or could not be referring

---

13 Specifically, section 12022.53, subdivision (e)(1) states: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved. [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

to Weekly's own *personal* discharge of a firearm. Weekly argues that "the personal firearm use enhancement imposed upon [Weekly] must be stricken because the prosecution did not plead personal use of a firearm by [Weekly]" and instead "alleged principal firearm use." Weekly contends that an allegation that he *personally used* a firearm was "required by both . . . section 12022.53, subdivision (j), and due process."

Turning first to Weekly's argument premised on subdivision (j) of section 12022.53, that code provision states in part: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." Here, we conclude that the information adequately alleges the existence of the facts required for section 12022.53, subdivision (d) to apply. Specifically, the amended information alleges that "the defendant, [Weekly], was a principal in the foregoing offense, and in the commission of the offense at least one principal personally and intentionally discharged a firearm." Because Weekly was alleged to be a principal, and a principal was alleged to have personally and intentionally discharged a firearm, the information sufficiently alleged the existence of facts necessary to support a finding that Weekly personally and intentionally discharged a firearm.[14]

For his due process argument, Weekly relies on *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*). *Mancebo* explained that "in addition to the statutory

---

14 Plainly the other requirement set forth in section 12022.53, subdivision (j) are present here, as the jury made a true finding that Weekly personally and intentionally discharged a firearm and Weekly admitted that he shot Sampson.

requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Id*. at p. 747.) In *Mancebo*, the information did not allege a multiple-victim-circumstance as a basis for imposing the One Strike law sentencing scheme (§ 667.61). Nevertheless, the trial court substituted the multiple-victim circumstance as a basis for a One Strike sentence after the verdict. (*Ibid*.) *Mancebo* concluded that it was improper for the court to make that substitution because the defendant did not receive fair notice that he could be sentenced based on a multiple-victim circumstance. (*Id*. at pp. 739, 754.)

The situation in *Mancebo* is very different from the instant case. Here, unlike *Mancebo*, the information expressly identified the firearm enhancement and alleged its specific code provision, namely section 12022.53, subdivision (d). Further, the information stated that Weekly was alleged to be a principal and that a principal personally and intentionally discharged a firearm. Those allegations put Weekly on notice that he could be found to have personally and intentionally discharged a firearm. Moreover, unlike in *Mancebo* the jury was instructed with the language applicable to section 12022.53, subdivision (d), and was presented with a verdict form that identified section 12022.53, subdivision (d) and tracked the applicable language of that statute. Under the circumstances, Weekly was provided with ample notice that the trial court could impose a 25-year-to-life sentence enhancement pursuant to section 12022.53,

subdivision (d) if the jury made a true finding that it applied.[15]

In sum, we conclude that there is no merit to Weekly's contention that the sentencing enhancement imposed under section 12022.53, subdivision (d) is unauthorized and should be stricken.

C. *The Abstract of Judgment Must Be Corrected to Reflect a Joint and Several Restitution Order*

As reflected in the reporter's transcript and the minute order from the sentencing hearing, the trial court imposed a victim restitution order pursuant to section 1202.4, subdivision (f) in the amount of $5,000, stating that "restitution is to be joint and sever[al]

---

15 Weekly also relies on *People v. Arias* (2010) 182 Cal.App.4th 1009 and *People v. Botello* (2010) 183 Cal.App.4th 1014. Those cases are inapposite because they arose in instances where the defendant received far less notice than Weekly received here, in that the charging document did not cite a specific code section and did not provide notice of the sentencing enhancement allegation at issue. Specifically, in *Arias*, the trial court sentenced the defendant to life terms for attempted murders under section 664, subdivision (a), which states that a life sentence shall be imposed for attempted murders that are willful, deliberate and premeditated. However, because the information did not allege that the attempted murders were willful, deliberate and premeditated and did not identify section 664, subdivision (a), *Arias* concluded that imposition of the life sentences violated the defendant's right to due process. (*Arias*, at pp. 1019-1020.) In *Botello*, the court concluded that it could not for the first time rely on section 12022.53, subdivision (e) to affirm the imposition of a firearm use sentencing enhancement because doing so would violate the defendants' right to due process. (*Botello*, at pp. 1022, 1027.) The specific sentencing enhancement was not alleged in the information, was not presented to the jury on the verdict form, and the trial court did not impose sentence based on that provision. (*Id*. at pp. 1021-1022.) Here, in contrast, imposition of the sentencing enhancement pursuant to section 12022.53, subdivision (d) did not violate Weekly's right to due process because Weekly received ample notice that his sentence could be enhanced pursuant to section 12022.53, subdivision (d) in that the specific code provision associated with the enhancement was pled in the information, was provided in the jury instructions along with the language of the enhancement, and was expressly identified in the verdict form.

with Angela Anderson," i.e., Weekly's codefendant in this matter. However, the abstract of judgment does not reflect joint and several liability as to the restitution order.

Weekly contends that the abstract of judgment should be amended to accurately reflect that his liability for the $5,000 restitution order is joint and several. The People do not oppose the request.

A trial court has the authority to order that victim restitution be paid jointly and severally. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535.) Further, a trial court's oral pronouncement of sentence controls over a conflicting abstract of judgment. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) As "[c]ourts may correct clerical errors at any time . . ." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185), we direct that the abstract of judgment be corrected to show that the restitution order imposed under section 1202.4, subdivision (f) is a joint and several obligation of Weekly and his codefendant Anderson.

DISPOSITION

The trial court is directed to amend the abstract of judgment to state the restitution order made pursuant to section 1202.4, subdivision (f) is the joint and several obligation of Weekly and Angela Anderson, and to thereafter forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

O'ROURKE, Acting P. J.

DATO, J.